

BEFORE THE GROWTH MANAGEMENT HEARINGS BOARD
WESTERN WASHINGTON REGION
STATE OF WASHINGTON

DAVID STALHEIM,

Petitioner,

v.

WHATCOM COUNTY,

Respondent.

Case No. 11-2-0001

**ORDER DENYING MOTION FOR
RECONSIDERATION**

This matter comes before the Board pursuant to a motion for reconsideration filed by Petitioner David Stalheim seeking reconsideration of the Board's Compliance Order of June 21, 2012, which found Whatcom County in compliance and closed the case.¹ The County failed to file a response within the time provided by Board rule.²

I. PROCEDURAL HISTORY

Petitioner originally challenged Whatcom County's December 7, 2010 adoption of Ordinance 2010-067, a six month temporary measure amending three sections of the Whatcom County Code. The effect of that ordinance was to allow a "one-time economic hardship extension" of permits which were set to expire between December 5, 2010 and March 1, 2012. Permits authorized for extension included planned unit developments, conditional uses, variances, administrative use permits, final short subdivisions, exempt land divisions, subdivisions, general or specific binding site plans, critical areas assessment reports, and geological assessment reports. Although the Ordinance stated it would expire on June 19, 2011, one day prior to the Board's Hearing on the Merits, its terms authorized permit or report extension requests to be filed until March 1, 2014.

¹ Petitioner David Stalheim's Motion for Reconsideration of Compliance Order, filed July 2, 2012.

² WAC 242-03-830(1)

1 The Board noted in its Final Decision and Order (FDO) that some of the permits which were
2 authorized to be extended by the Ordinance were originally granted as long ago as the
3 1990s. The Board observed that the County had adopted numerous new environmental
4 requirements in its Comprehensive Plan, Shoreline Management Plan and development
5 regulations since the permits were originally granted. The Ordinance thus allowed permits
6 to remain in effect without application of more recently adopted development standards and
7 critical areas assessments. The Board found the Ordinance violated RCW 36.70A.060(2),
8 RCW 36.70A.130(1)(d), RCW 36.70A.390, and RCW 36.70A.480 as it failed to protect the
9 environment, critical areas, and shorelines, and failed to apply Best Available Science (BAS)
10 as required by RCW 36.70A.172. A failure to complete a SEPA analysis resulted in an
11 RCW 43.21C.030(2) violation. Finally, the Board found the County's actions were not
12 guided by Goal 10 (RCW 36.70A.020(10)) and entered a determination of invalidity.
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16 The County's first compliance effort was the adoption of Resolution 2011-037 "Clarifying the
17 Meaning of Expired Ordinance 2010-067" -- a purported repeal of the Ordinance. The
18 Board's Compliance Order of January 23, 2012 found the Resolution did not bring the
19 County into compliance as the Whatcom County Charter provides that a resolution has no
20 force of law. The Board concluded the originally challenged Ordinance remained in effect
21 until the County's adoption of a repealing ordinance.³
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24 Thereafter, the County adopted Ordinance 2012-013, which specifically repealed the
25 originally challenged ordinance, Ordinance 2010-067. The Petitioner contested the
26 County's compliance, arguing the permits which had been extended subsequent to the
27 Board's FDO continued to have environmental effects greater than what would have been
28 allowed under updated regulations. However, in its second Compliance Order dated June
29 21, 2012, the Board found that Whatcom County had come into compliance and closed the
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32 ³ A concern which arose at the time was that the County had apparently extended four permits subsequent to the date of the FDO, which included a determination of invalidity.

1 case. The Board's finding of compliance was based on its conclusion that it lacked
2 jurisdiction over local government permits. The Petitioner's motion for reconsideration
3 applies to the June 21, 2012 Compliance Order.
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5 II. BOARD DISCUSSION AND ANALYSIS

6 A motion for reconsideration of a final decision of the Board is governed by WAC 242-03-
7 830. It provides, at WAC 242-03-830(2), that a motion for reconsideration must be based
8 on at least one of the following grounds:
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- 10 (a) Errors of procedure or misinterpretation of fact or law, material to the party
seeking reconsideration;
- 11 (b) Irregularity in the hearing before the board by which such party was
12 prevented from having a fair hearing; or
- 13 (c) Clerical mistakes in the final decision and order.

14 The Petitioner's motion alleges material errors of fact or law. He contends the County's
15 repeal of Ordinance 2010-067 failed to result in compliance with the FDO, which found it:
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- 17 • Failed to protect critical areas and failed to incorporate BAS;
- 18 • Was inconsistent with a section of the Comprehensive Plan regarding
application of BAS to protect threatened or endangered species;
- 19 • Resulted in an RCW 36.70A.390 violation as it was adopted as an
20 emergency ordinance and purported to remain effective for more than six
21 months;
- 22 • Was adopted without SEPA compliance.

23 Repeal of the Ordinance addressed the failure to consider BAS, eliminated the
24 inconsistency and addressed the RCW 36.70A.390 violation, except as to permits which the
25 County extended while subject to the invalidity finding. While the County failed to comply
26 with Chapter 43.21C RCW (SEPA) in adopting the original Ordinance, remanding to the
27 County to conduct a threshold determination at this point would not address Stalheim's
28 concerns. Those concerns relate to expired permits, or those set to expire, which were
29 extended without application of development regulations adopted since the permits were
30 originally issued. As Stalheim asserts, repeal failed to ". . . address the **seven permit**
31 **extension** requests that remain pending and on file, but not acted upon" and "the County
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1 did not direct staff to discontinue making **land-use decisions** on permit extensions it
2 granted under the invalidated ordinance. . . ."⁴ (emphasis added)

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4 While the Board has expressed its serious concerns regarding the County's actions in prior
5 orders, remedies to address the impact of extended permits are not available to the Board.
6 The Board's jurisdiction is limited by RCW 36.70A.280.⁵ The Superior Court has exclusive
7 jurisdiction to address "land use decisions."⁶ Land use decisions are defined by RCW
8 36.70C.020.⁷ Extensions of permits are included within the definition.⁸
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10 While the Board appreciates Petitioner's zealous advocacy for environmental protection, the
11 Board finds it does not have the authority to grant the relief Petitioner seeks.
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14 ⁴ Petitioner's Motion for Reconsideration, at 3

15 ⁵ Growth management hearings board — Matters subject to review.

16 (1) The growth management hearings board shall hear and determine only those petitions alleging
17 either:

18 (a) That, except as provided otherwise by this subsection, a state agency, county, or city planning
19 under this chapter is not in compliance with the requirements of this chapter, chapter 90.58 RCW as it
20 relates to the adoption of shoreline master programs or amendments thereto, or chapter 43.21C RCW
21 as it relates to plans, development regulations, or amendments, adopted under RCW 36.70A.040 or
22 chapter 90.58 RCW. Nothing in this subsection authorizes the board to hear petitions alleging
23 noncompliance with *RCW 36.70A.5801....

24 ⁶ RCW 36.70C.030 Chapter exclusive means of judicial review of land use decisions — Exceptions:

25 (1) This chapter replaces the writ of certiorari for appeal of land use decisions and shall be the
26 exclusive means of judicial review of land use decisions, except that this chapter does not apply to:
27(the exceptions are inapplicable)

28 ⁷ RCW 36.70C.020(a)(2):

29 "Land use decision" means a final determination by a local jurisdiction's body or officer with the
30 highest level of authority to make the determination, including those with authority to hear appeals, on:

31 (a) An application for a project permit or other governmental approval required by law before real
32 property may be improved, developed, modified, sold, transferred, or used, but excluding applications
for permits or approvals to use, vacate, or transfer streets, parks, and similar types of public property;
excluding applications for legislative approvals such as area-wide rezones and annexations; and
excluding applications for business licenses...

(b) An interpretative or declaratory decision regarding the application to a specific property of zoning
or other ordinances or rules regulating the improvement, development, modification, maintenance, or
use of real property; and

(c) The enforcement by a local jurisdiction of ordinances regulating the improvement,
development, modification, maintenance, or use of real property. However, when a local jurisdiction is
required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be
brought under this chapter....

⁸ See *Habitat Watch v. Skagit County*, 155 Wn.2d 397

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III. ORDER

Having reviewed Petitioner’s Motion for Reconsideration, the Final Decision and Order, and the prior Compliance Order, the Board concludes its Compliance Order of June 21, 2012 was not based on a material mistake of fact or law and Petitioner’s Motion for Reconsideration is denied.

Dated this 17th day of July, 2012

Nina Carter, Board Member

William Roehl, Board Member

Note: This is a final decision and order of the Growth Management Hearings Board issued pursuant to RCW 36.70A.300.⁹

⁹ A party aggrieved by a final decision of the Board may appeal the decision to Superior Court within thirty days as provided in RCW 34.05.514 or 36.01.050. See RCW 36.70A.300(5) and WAC 242-03-970. It is incumbent upon the parties to review all applicable statutes and rules. The staff of the Growth Management Hearings Board is not authorized to provide legal advice.